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No. 97-503

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

October Term, 1997

PAUL JOHNSON; KEVIN WADSWORTH; LAUREN COOPER; RAY SEBASTIAN & BARBARA SEBASTIAN, individually and on behalf of all others similarly situated,

*Petitioners,*

v.

DAVID KNOWLES; REPUBLICAN CENTRAL COMMITTEE OF EL DORADO COUNTY; STEVEN BAILEY; ROBERT BECKER; ED BORBA; BERNARD CARLSON; MERLIN CHARDI; CHRISTINA COWELL; CHARLES CHRISMAN; DAN DELLINGER; SUSAN EMIGH; TOM EMIGH; MICHAEL FRENN; MALOA GRIBKOFF; KEVIN HANLEY; TOM SCHUMACHER; JOHN STELZMILLER; LAVETA STELZMILLER; DAVID TITUS & DOES 1-25

*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## PETITIONERS' REPLY BRIEF

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# PETITIONERS' REPLY BRIEF

## I. Petitioners Have Not Waived Their 42 USC §§1985(3) and 1986 Claims

Respondents correctly note that "Petitioners' opening brief to the Ninth Circuit was devoid of *any* challenge to the District Court's dismissal of their Section 1985 and 1986 claims." Respondents' Opposition Brief (ROB), at 13-14. However, that does not mean Petitioners waived those claims or that they may not be reviewed by this Court.

The Ninth Circuit rule that a plaintiff waives all claims pled in an original complaint when they are not repled in an amended complaint, *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981), "only applies to amended complaints that follow upon dismissal with leave to amend, and not to those that follow summary judgment." *USS-Posco Industries v. Contra Costa County Bldg. & Const.*, 31 F.3d 800, 812 (9th Cir. 1994). The District Court dismissed Plaintiffs' §1985(3) and 1986 claims without leave to amend, the equivalent of a summary judgment dismissal. Respondents' Appendix (RA) at 40. Review of those claims has not been waived.

Commencing with the April 18, 1996, filing of their Civil Appeals Docketing Statement (CADS) required by Ninth Circuit Rule 3-4, Petitioners put both the Ninth Circuit and Respondents on notice that they were preserving the question of "Whether or not gays are a protected class for purposes of [their] 42 USC §1985 claims." Petitioners' Notice of Appeal, filed that same day, specifically listed "the judgment of the district court, entered in this case on March 20, 1996, *and all previously entered interlocutory orders and decisions of the court,*" as the items appealed.

Further, Petitioners' CADS advised both the Ninth Circuit and Respondents that Petitioners anticipated a motion to file an *amicus'* brief supporting Petitioners' appeal. Ninth Circuit Advisory Committee Note to Ninth Circuit Rule 29-1 prohibits repeating arguments made by the parties in *amicus* briefs. Petitioners and their supporting *amicus* thus efficiently - and properly - divided the work of addressing the issues on appeal between them under the governing Ninth Circuit rules.

*Amicus'* analysis of the 42 USC §§1985(3) and 1986 issues in its brief preserves them for review, *Teague v. Lane*, 489 U.S. 288, 300 (1989) and *Davis v. U.S.*, 114 S.Ct. 2350, 2354, fn * (1994), even if the Ninth Circuit, for whatever unexplained reason, denied the motion to file the sole *amicus* brief in this case. The Panel was timely presented with both a motion for leave to file an *amicus curiae* brief and the brief itself. Arguments in Petitioners' briefs were not repeated in *amicus'* brief or *vice-versa*. Yet, the Panel disallowed the filing of this sole *amicus* brief and ignored its arguments. AX A-2, fn 1.[1]

While receipt of *amicus curiae* briefs is discretionary, they assist in "insuring a complete and plenary presentation of difficult issues so the court may reach a proper decision." *Gotti v. U.S.*, 755 F.Supp. 1157, 1158 (ED, NY: 1991), (disallowing tardy and duplicative *amicus* brief). In declining the proffered *amicus* brief, the Panel abused its discretion and left unresolved recurring issues of national importance that should be reviewed on certiorari.

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[1]The rejected *amicus* brief is appended hereto as AX F.

Finally, Respondents cannot claim to have been misled in this regard since their briefs in both the Ninth Circuit and District Court fully explored the issues. *Greyhound Corp. v. Blakley*, 262 F.2d 401, 407-08 (9th Cir. 1958). Respondents' raising the issues in their briefs to the Ninth Circuit also gives this Court discretion to review the issues, even if Petitioners and *amicus* had not done so in theirs.[2] *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990). This Court may also "consider it prudent and in the interest of justice to reach the issue at this time." *U.S. v. Holzman*, 871 F.2d 1496, 1512 (9th Cir. 1989). No other case now pending before this Court presents a more compelling reason to do so.

## II. Denying The Fundamental Right To Vote Cannot Be Justified Under the Guise of "Party Management"

Respondents admit that the "right of political parties to govern their internal affairs without state interference involves an issue of significant national importance." ROB at 17. However, they err in stating that "it was resolved long ago" in connection with the facts of this Petition, for the instant matter is not a national convention delegate selection dispute, as were *Cousins v. Wigoda*, 419 U.S. 477 (1975) and *Democratic Party of the U.S. v. Wisconsin*, 450 U.S. 107 (1981), but is a test of the democratic process at its most elementary level.

Respondents thus sweep too broadly when they argue Petitioners advocate a "constitutionally flawed" "construction of the state action requirement which equates internal management of political parties with the official action of

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[2]Petitioners also addressed these issues in their Reply and En Banc Rehearing briefs filed in the Ninth Circuit.

government." ROB at 18. Petitioners seek neither to "rewrite the bylaws of the Republican Party" nor to "pass judgment" on the central committee's platform; what they seek is to retain their elected memberships on it without prejudice from their sexuality. Petitioners do not argue that central committees are state actors for all purposes; they do assert that in the limited context of admitting and expelling their popularly elected membership, central committees should be considered state actors subject to federal constitutional constraints.

Respondents quoted *Cousins*' holding that "any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Id.*, at 488. Respondents thus balance the rights of party members against those of the party itself and claim that even in the context of this Petition the rights of the committee outweigh those of its members. Since the committee is formed by individuals elected in a local primary, its collective rights, however denominated, cannot outweigh those of the people who voted it into existence. But for that election, Respondents would have no association on which to make their own derivative claim to associational rights.[3]

Nor is *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), which involved a state's futile attempt to limit a party's opening its ranks to non-members, controlling here. The decision made by Connecticut Republicans to *broaden* their base was a forthright exercise of political skill which in no way deprived anyone of a vote or *restricted* party membership, itself a constitutional right. *Kusper v. Pontikes,* 414 U.S. 51, 57 (1973); *accord, Republican*

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[3]*Cf., Anderson v. Celebrezze*, 460 U.S. 781, 787-88 and fn 8, (1983), discussing *voters'* freedom of association.

*Party of Arkansas v. Faulkner,* 49 F.3d 1289, 1294 (8th Cir. 1995). Nor was "raiding" involved there or here, as it was in *Rosario v. Rockefeller*, 419 U.S. 752 (1973) and *Storer v. Brown*, 415 U.S. 724 (1974), which were cited in Petitioners' opening brief to the Ninth Circuit to demonstrate that a state has "a compelling interest in preserving the integrity of its election process," *Rosario, supra,* at 761, and that it "may enact laws that interfere with a party's internal affairs when necessary to ensure that elections are fair and honest. *Storer, supra,* at 730.

To the extent that Respondents have any associational rights, this Court's decision in *Morse v. Republican Party of Virginia,* 116 S.Ct. 1186 (1996), makes it clear they have no application even where asserted beyond opposition to party membership along racial lines. *Id.*, at 1210. Indeed, *Morse* quoted from *Eu v. San Francisco County Democratic Central Committee,* 489 U.S. 214 (1989), to justify intervention where "necessary to prevent the derogation of civil rights of party adherents," *Eu, supra,* at 232, quoted in *Morse, supra*, which certainly describes the individual and class plaintiffs in this action.[4]

In electing Johnson and Wadsworth to the committee, the voters did not agree to forfeit their fundamental right to choose who would best set local party policy in exchange for committee resolution of membership disputes under arbitrary, capricious and unconstitutionally vague standards like those used to oust Johnson and Wadsworth. Califor-

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[4]*Accord, Rockefeller v. Powers*, 74 F.3d 1367, 1375, fn 12 (2nd Cir. 1995): "none of the cases cited by the defendants stands for the proposition that state action that implicates a political party somehow becomes immune from judicial review because of a party's First Amendment associational rights."

nia's Elections Code already provided for resolving such disputes, as much as it provided for determining membership on central committees, and sexual orientation appears neither as a qualifier or disqualifier for committee membership. Clearly, Petitioners' allegations that they were removed because of their sexual orientation pled valid claims for federal constitutional relief.

*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S.Ct. 2338 (1995), is completely distinguishable from this Petition and does not direct its disposition. *Hurley* involved not the polls but a parade; a St. Patrick's Day one at that, traditionally and as a matter of record a time of greater mirth than might be expected on election day. *Id.*, at 2341. Moreover, it involved not §1983's state action requirement, but whether or not the admittedly private organization sponsoring the parade had violated Massachusetts' public accommodations law. *Id.*, at 2344. The most distinguishing factor, however, is found when comparing winning election to a central committee in a primary to applying or "simply showing up" to march in a parade. *Id.*, at 2342. As Respondents argued below, "the choice of a speaker not to propound a particular point of view" begs the question of who is the speaker. In *Hurley,* it was the parade organizers; here, it is the voters who spoke at the polls, not the committee or its members who silenced them by ousting Johnson and Wadsworth.

This Court has refused to find that state non-discrimination or public accommodation laws infringe a private organization's associative rights where those laws do not significantly alter the organization's ability to carry out its purpose or propagate its message. *New York State Club Ass'n. v. City of New York,* 487 U.S. 1, 13 (1989); *Board of Directors of Rotary Int'l. v. Rotary Club of Duarte,* 481

U.S. 537, 548 (1987); *Roberts v. U.S. Jaycees,* 468 U.S. 609, 622 (1984). Respondents have not shown that keeping Johnson and Wadsworth on the committee or not discriminating against them on the basis of their sexual orientation would in any way impair their ability to carry out their purposes or communicate with the voters, let alone that either Petitioner sought to impose a "gay agenda" upon the committee. Indeed, the pleadings establish that the committee itself failed to communicate its message to its electorate by refusing to publicize its meetings in advance, as it had determined to do. AX E, at ¶27. Respondents cannot demonstrate that they would be obliged to "'abandon or alter' any activities that are protected by the First Amendment." *New York State Club Ass'n., supra.* They only thing Defendants abandoned or altered was the voters' choice of Johnson and Wadsworth as their elected representatives on the committee.

As this Court wisely held in striking down racist child custody restrictions in *Palmore v. Sidoti*, 466 U.S. 29 (1984):

> "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. *Id.,* at 433.

This Court should not give effect to Respondents' private biases, as expressed in their twice ejecting Johnson and Wadsworth from their twice elected seats on the central committee, by allowing those ousters to stand without constitutional challenge.

## III. Certiorari Should Be Granted To Reaffirm *Romer v. Evans* And To Find Homosexuals A Protected Class For Petitioners' 42 USC §§1985(3) & 1986 Claims

As noted in the instant Petition, at 29, fn 12, this Court, more than a year ago, remanded to the Sixth Circuit Court of Appeals its decision in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995), for reconsideration in light of *Romer v. Evans*, 116 S.Ct. 1620 (1996). On October 23, 1997, the Sixth Circuit finally issued its opinion, which is cited electronically at 1997 FED App.0318P (6th Cir.) (herein, *Equality II*).

The Sixth Circuit's opinion flies in the face of *Romer* and reason. After reciting, at fn 2, a list of cases disallowing protected class status to homosexuals, most relying upon this Court's earlier decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which specifically avoided equal protection analysis of criminal sodomy laws, the opinion on remand effectively reduced its inquiry to the absurdity of distinguishing Cincinnati's local ordinance, prohibiting what were seen as "special privileges" for homosexuals, from Colorado's statewide constitutional amendment, withdrawing the same basic citizens' rights from gays and lesbians. In reaffirming its prior opinion, the Sixth Circuit concluded that the Cincinnati law "did not disempower a group of citizens from attaining special protection at all levels of state government, but instead merely removed municipally enacted special protection from gays and lesbians." *Equality II, supra.*

The real danger in *Equality II*, apart from its ignoring *stare decisis* and the remand order from this Court, is its notion that the end justifies the means; if there was ever a result in search of a rationale, *Equality II* is it. Moreover,

the Sixth Circuit has ignored the clear trend of legal evolution post-*Romer*. As properly recognized by its sister circuit in *Nabozny v. Podlesny*, 92 F.3d 446, 458 fn 12 (7th Cir. 1996), "Of course, *Bowers* will soon be eclipsed in the area of equal protection by ... *Romer v. Evans*."[5]

*Equality II* may evidence another, less just, trend that this Court should stop in its tracks by granting certiorari: exploiting the unprotected class status of homosexuals by legislating against them with impunity. *Romer* properly cut short one such attempt; *Equality II* and this case show that there will be more efforts to deny homosexuals the equal protection of the laws and the equal opportunity to participate in the political life of our nation. The one sure way to prevent further abuses of their political rights is to at last recognize that gays and lesbians are indeed a suspect class and that they have a fundamental right to participate in the political process without prejudice to their sexuality.

Together, the Ninth Circuit's opinion in the instant Petition and the Sixth Circuit's opinion in *Equality II* would consign homosexuals to political exile and forever preclude them from repatriating themselves, whether by working through their chosen political party or through their local government. Whether heard separately or together, both decisions should be reviewed on certiorari to ensure that *all* citizens may exercise their fundamental political rights and protect those rights under the federal civil rights laws whenever and at whatever level they are threatened.

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[5]Note also *Nabozny's* recognition that "homosexuals are an identifiable minority, subject to discrimination in our society. Given the legislation across the country both positing and prohibiting homosexual rights, that proposition was as self-evident in 1988 as it is today." *Id.*, at 457.

Respectfully submitted

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